IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEVIN LEWIS, Plaintiff,	:	CIVIL ACTION
v.	:	
BRUCE BABBITT, Secretary, Department of the Interior, Defendant.	:	NO. 97-CV-7576

MEMORANDUM & ORDER

J.M. KELLY, J. **MAY , 1999**

Trial was held in this matter from October 26th through 29th, 1998, in front of a jury and before the Honorable Joseph L. McGlynn, Jr. The jury found in favor of the Defendant on the racial discrimination claim of Plaintiff, Kevin Lewis ("Lewis"). Lewis prevailed on his claim of retaliation for exercising his Title VII rights and was awarded $85,000.00 by the jury. Defendant now seeks to have the Court enter judgment in his favor as a matter of law, or in the alternative, Defendant seeks a new trial. Upon the untimely death of Judge McGlynn, this matter, including the present motions, was transferred to my docket.

I. LEGAL STANDARD

A. NEW TRIAL

The purpose of a motion for a new trial, pursuant to Federal Rule of Civil Procedure 59, is to allow the court to reevaluate the basis for an earlier decision. Tevelson v. Life and Health Ins. Co. of Am., 643 F. Supp. 779, 782 (E.D. Pa. 1986), aff'd, 817 F.2d 753 (3d Cir. 1987). Since granting a motion for a new trial acts to overturn a jury verdict, the court will not set

aside the jury's verdict unless "manifest injustice will result if the verdict is allowed to stand." Emigh v. Consolidated Rail Corp., 710 F. Supp. 608, 609 (W.D. Pa. 1989). To grant a motion for a new trial, the court must find "that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict." Nebel v. Avichal Enter., Inc., 704 F. Supp. 570, 574 (D.N.J. 1989). Therefore, a new trial may be granted even where judgment as a matter of law ("JMOL") is inappropriate. Roebuck v. Drexel Univ., 852 F.2d 715, 735-36 (3d Cir. 1988). Federal Rule of Civil Procedure 50(b) allows a motion for JMOL to be joined with a motion for a new trial. See Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 250-51 (1940).

B. JUDGMENT AS A MATTER OF LAW

JMOL, pursuant to Federal Rule of Civil Procedure 50, is appropriate only where, as a matter of law, a jury's verdict was not supported by sufficient evidence to allow a reasonable juror to arrive at the verdict. Link v. Mercedes-Benz of No. Am., 788 F.2d 918, 921 (3d Cir. 1986). In making the determination to grant JMOL, the court must find that as a matter of law, "the record is critically deficient of the minimum quantity of evidence from which the jury might reasonably afford relief." Simone v. Golden Nugget Hotel & Casino, 844 F.2d 1031, 1034 (3d Cir. 1988). The party prevailing at trial is entitled to the benefit of all reasonable inferences that can be drawn from the evidence in order to

determine that there is any rational basis for the verdict. Bhaya v. Westinghouse Elec. Co., 832 F.2d 258, 259 (3d Cir. 1987). JMOL is only appropriate when there is no evidence or reasonable inference that can be drawn supporting the verdict. SCNO Barge Lines, Inc. v. Anderson Clayton & Co., 745 F.2d 1188, 1192-93 (8th Cir. 1984).

II. FACTS

The evidence produced at trial, taken in the light most favorable to Lewis, established the facts that follow.[1] Defendant, Bruce Babbitt, is sued in his official capacity as Secretary of the Interior. The National Park Service ("Park Service") is part of the Department of the Interior. Lewis was hired as a law enforcement Park Ranger in March 1992. Lewis works at Independence National Historical Park ("INHP") in Philadelphia. In his first evaluation as a Park Ranger in 1992, Lewis was graded as "fully successful."[2] On his next evaluation in September 1993, Lewis was graded as "exceeds fully successful." As a result of the second evaluation, Lewis believed that he was eligible for a promotion from GS-5 to GS-7. Lewis also believed that he was being denied

[1] Obviously, Defendant could draw a different factual scenario, although most of the underlying facts are not disputed.

[2] There is evidence that Lewis' Supervisor, Patrick Bowman ("Bowman") stated he would retaliate against Lewis for challenging a statement in this evaluation, but this evaluation pre-dates the EEO complaints, therefore it does not demonstrate retaliation for a protected activity under Title VII. It is not inconceivable that this incident started a pattern of harassment, but Lewis' subsequent EEO complaints were a determinative factor in his transfer to the interpretation division.

training. Consequently, Lewis filed an EEO Complaint in which he alleged that he was denied promotion and training because of his race. Bowman offered to promote Lewis if Lewis withdrew his Complaint. Lewis withdrew his Complaint and was promoted to GS-7.

Lewis, however, never received the training he had requested. As a result, he wrote a letter to Representative James Saxton, complaining about how training decisions were made. Representative Saxton wrote a letter to the Parks Service, requesting that the issue of training be addressed. Representative Saxton was told that Lewis had attended nine seminars, even though six of those seminars were required, one canceled, one was approved and one was pending at the time Lewis wrote the letter. Following the letter from Representative Saxton, Lewis received an additional course. Because he was not satisfied with the Park Service's response to Representative Saxton's letter, Lewis wrote another letter to Representative Saxton and Representative Saxton wrote another letter to the Park Service. There is no evidence of any outcome as a result of the second letter from Representative Saxton. In April and May of 1995, Lewis met with several of Bowman's superiors to discuss Lewis' complaints of ongoing harassment by Bowman. In addition, Lewis also addressed the level of direction that he received from his current supervisor, Michael Dumene ("Dumene").

Subsequently, Lewis was injured on the job and missed time from work. Lewis was charged with being absent without leave,

despite providing his supervisors with the required forms from his doctors. It was indicated to Lewis that Bowman had initiated a review of Lewis' records for abuse of sick leave.

In April 1995, Lewis' direct supervisor became Dumene. Dumene tried to change Lewis' days off, despite Lewis' seniority. Lewis only retained his previous days off when he addressed this issue with Dumene's supervisor. Dumene told Lewis that he was going to be suspended for five days for making derogatory comments about Bowen, but this suspension never took place.

On May 24, 1995, Lewis was working on the midnight shift with Dumene. Lewis asked to use annual leave on May 31, 1995. Dumene responded angrily and refused to grant Lewis' request. Dumene then approached Lewis and pointed a finger in his face. Lewis asked Dumene to move his finger. Dumene told Lewis that he would put his finger in Lewis' face any time he wanted to. Lewis called the Assistant Chief Ranger at approximately 12:15 A.M. and requested to be removed from under Dumene's supervision. Lewis followed up with a report on the Assistant Chief Ranger's desk the next morning. Lewis expressed concern for his personal safety and commented that both he and Dumene were armed during the confrontation. The complaint was returned to Dumene. Lewis proceeded up his chain of command with his complaint against Dumene, but received no change in his assignment. Lewis attempted to learn from the Department of the Interior what additional steps were available to him, but he received no additional information. Lewis then filed an EEO

complaint.

Immediately thereafter, Bowman removed Lewis' weapon and credentials and Lewis was assigned to administrative duty. He was also requested to undergo a psychological evaluation. Lewis was removed from his position as fitness coordinator. On September 21, 1995, Lewis gave Dumene a leave request slip for annual leave that had been verbally requested. Dumene claimed he lost the leave request and cited Lewis for being AWOL. Dumene recanted when another employee confirmed the verbal approval. On October 12, 1995, Dumene documented in a memorandum that Lewis was wandering around the park while on duty, when in fact, Lewis was completing his assignments.

On August 10, 1995, Lewis went before a Board of Review that recommended that his law enforcement commission be suspended for two years and he be transferred to another division. On October 15, 1995, Lewis' law enforcement commission was suspended permanently and he was transferred to Historical Division, Interpretation. Part of the evidence presented at the Board of Review concerned two off duty incidents. This evidence was presented against Lewis, despite assurances that the letter of warning drafted by Bowman would be removed from his record within a year. (Letter of Warning, April 5, 1993). There was evidence presented that no other Rangers were subjected to successive discipline for past acts.

Lewis received his last review prior to the May 24, 1995 incident in October 1994. In that review he was rated

"exceeds fully successful."

On November 8, 1995, Dumene gave Lewis a mid-year review with an unacceptable rating. Dumene told Lewis that he had failed an element of this review because of the time he had spent writing to his Congressman and the Secretary of the Interior.

Defendant presented the testimony of Martha Aikens ("Aikens"), the Superintendent of INHP, as well as the EEO manager for the park. Aikens stated that any allegations of racism at INHP were a "crock." (N.T., 199:24). She dismissed Lewis' testimony that his current historical costume made him feel like a slave as "bunk." (N.T., 202:22-23). She also testified that no EEO complaint at INHP had been found to have merit. (N.T., 205:19-22). The jury could conclude from her testimony that Aikens is very proud of her EEO record as Superintendent, and doesn't tolerate those who put her record in jeopardy. As Superintendent, Aikens' attitude could easily permeate throughout management of INHP.

III. DISCUSSION

Title VII prohibits an employer from discriminating against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation . . . under this subchapter." 42 U.S.C. § 2000e-3(a) (1994). The shifting burden in a Title VII case requires a plaintiff to first prove a prima facie case for

the employment decision in question. The employer may then come back with a legitimate, nondiscriminatory reason for the employment action. The burden then returns to the plaintiff to prove that the offered explanation is pretextual. McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973). In a pretext case, such as here, in order to establish a prima facie case, a plaintiff must show 1) the plaintiff was engaged in a protected activity; 2) the plaintiff received an adverse employment decision contemporaneous with or following protected activity; and 3) there is a causal link between the protected activity and the discharge. Quiroga v. Hasbro, Inc., 934 F.2d 497, 501 (3d Cir. 1991). Lewis' EEO Complaints and letter to Representative Saxton were protected activities, which preceded his loss of his law enforcement commission and transfer to historical interpretation. Defendant challenges whether Lewis has established a causal link, and is liable only if its prohibited act was a determinative factor in the adverse employment decision to the plaintiff. Woodson v. Scott Paper Co., 109 F.2d 913, 932 (3d Cir.), cert. denied, 118 S. Ct. 299 (1997).

Defendant argues that the temporal remoteness of Lewis' EEO complaint precludes liability. The "mere passage of time is not legally conclusive proof against retaliation." Robinson v. SEPTA, 982 F.2d 892, 894 (3d Cir. 1993). In Robinson, two years passed between the time that Robinson's protected activity and his termination by SEPTA. The temporal remoteness may have served to exonerate SEPTA, except that an intervening pattern of

harassment also existed. Id. at 895. Similarly, in Woodson, the evidence supported a finding that Woodson had been retaliated against, despite a two year gap between the protected activity and discharge, because there was sufficient evidence to show a pattern of antagonism. Woodson, 109 F.3d at 921-22.

In the present case, Lewis filed his first EEO complaint following his September 1993 review. Following that complaint, Lewis continued to be denied training and was subjected to ongoing harassment by Bowman that was the subject of meetings between Lewis and INHP management in April and May of 1995. Bowman initiated an investigation into Lewis' use of sick leave and Lewis was reported as AWOL while on Worker's compensation leave. Dumene tried to change Lewis' days off and did not give Lewis proper direction. Dumene threatened to suspend Lewis for making derogatory comments about Bowman. Lewis also wrote his first letter to Representative Saxton during this time period, which maintained the pressure for training. The jury could conclude that the May 24, 1995, incident with Dumene was part of a continuing pattern of harassment related to Lewis' first EEO complaint. It would then follow that the actions that followed May 24, 1995, through Lewis' transfer to interpretation, were part of the pattern of retaliatory harassment.

But even assuming, arguendo, that the 1993 EEO complaint is too remote, Lewis filed another EEO complaint after May 24, 1995. Following the second EEO complaint, Lewis had his law enforcement commission suspended, lost his position as

fitness coordinator, was advised to undergo a psychological evaluation, was threatened with being considered AWOL, was harassed by Dumene, had his law enforcement commission revoked and was transferred to interpretation. The jury could conclude, without any temporal objection, that Lewis' law enforcement commission was revoked as a direct result of the second EEO complaint. Further, the jury could conclude that Aikens did not tolerate those that jeopardize her EEO record and her staff took care of a chronic complainer in quieting Lewis.

Finally, Dumene's statement that Lewis failed an element of his rating because of the time spent writing to his Congressman and the Secretary of the Interior evidences direct retaliation for a protected act. Given the usual difficulty of developing direct evidence of discrimination, the jury could have properly given great weight to this statement.

IV. CONCLUSION

While there was contradictory evidence presented at trial concerning the inferences that can be drawn from the evidence, the Court is convinced that there was a rational basis for the jury verdict on the retaliation count. Considering the large amount of acts which demonstrate retaliation against Lewis that occurred after the May 24, 1995, incident with Dumene, with the antecedent pattern of retaliation and harassment, the Court will not upset the jury's verdict in this matter. The Motion for JMOL or a New Trial shall be denied.

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O R D E R

AND NOW, this day of May, 1999, upon consideration of the Motion for a Judgment as a Matter of Law, or in the alternative, for a New Trial of Defendant, Bruce Babbitt, and the Response thereto of Plaintiff, Kevin Lewis, it is ORDERED that the Motion is DENIED.

BY THE COURT:

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JAMES McGIRR KELLY, J.